IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 140 of 1993
with
FIRST APPEAL NO. 141 of 1993

Date of decision: 30-9-98

For Approval and Signature

The Hon'ble Mr. Justice S. K. KESHOTE

1. Whether Reporters of Local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of the judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India,1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

THE ORIENTAL INSURANCE CO LTD.

Versus

MINOR PRAYAN BABUBHAI PATEL THRO'BABUBHAI MANABHAI PATNI

Appearance:

MR RAJNI H MEHTA with Mr. Nirav Thakkar for Appellant

Mr. Mehul Shah for Respondents No. 1 to 4

None present for other respondents.

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision:30-9-98

C.A.V. JUDGEMENT

These two appeals arise from one and the same motor accident and the claim applications, which have been decided by common judgment and order by the Motor Accident Claims Tribunal (Main), Mehsana and, therefore, the same are taken up for hearing together and are being disposed of by this common order. The offending vehicle is a matador bearing registration No. GAQ 4465 which is owned by respondent No.3 Shantaben Govindbhai Patel. Respondent No.5 - Mir Asrafali Rasulbhai was the driver of this vehicle on the fateful day. He also sustained injury as a result of this accident, and he filed M.A.C.Petition No.879/86 for compensation. Two of the victims of the incident, i.e. wife and son of claimant - respondent Babubhai Manabhai Patni have died in the accident, who filed claim applications No.362/86 and 363/86. The of ending motor vehicle was insured with the appellant herein.

2. The matador which was driven by Mir Asrafali Rasulbhai when met with the accident on 4-11-1985 was carrying therein number of persons. While driving the vehicle the driver lost control on the steering near Hansapur village and the vehicle dashed against a tree. Thus this accident has been occurred because of the rash and negligent driving of the driver of the matador. In this accident some of the persons expired and some sustained injuries. There were in all 14 claim applications for compensation inclusive of claim application No.362/86 and 363/85. The learned Tribunal under its impugned award awarded Rs.25,000/- and Rs.1,00,000/- respectively in these two claim applications. Against the judgment of the Tribunal only in these claim applications the insurance company has preferred these two appeals; and in other claim applications appeals have not been preferred. The appellant has given out the explanation for this that in other claim applications small amounts have been awarded. In one of these appeals, the amount of compensation awarded by the Tribunal is Rs.25,000/-. Be that as it may.

3. Learned counsel for the appellant contended that the Tribunal has committed serious illegality in holding that the deceased were not fair paid passengers in the matador. It has next been contended that the vehicle was a private vehicle and by carrying passengers for hire and reward the insured has committed breach of the terms of

the policy and, therefore, the Tribunal could not have awarded compensation to the claimants. On the other hand the counsel for the claimants supported the judgment of the Tribunal.

4. I have given my thoughtful consideration to the submissions made by the learned counsel for the parties. It is true that in the claim applications the claimants made averments that the deceased were travelling in the vehicle as paid passengers. It is the admission of the claimants, and it is equally true that the admission is a substantive evidence. But the approach of the Tribunal in this case in not relying on this admission cannot be said to be erroneous or perverse.

5. Babubhai Manabhai Patni, the claimant has been examined at Exh.104. Learned counsel for the appellant does not dispute that in the examination chief he has not stated that his wife or son had paid fare to the driver, and that they were carrying baskets of vegetables. It is also not in dispute that the insurance company has not confronted this witness with his admission in the pleadings. Not only this, no suggestion has been made during the course of his examination by the insurance company that the deceased persons were travelling in the vehicle as paid passengers along with their vegetable baskets. Learned tribunal has kept in mind the settled principle that the pleadings are binding to the parties. Babubhai Manabhaiwas not travelling in the vehicle and he could not have personal knowledge of the fact that his wife and his son were travelling in the matador as paid passengers. He has not seen his wife and son giving fare to the driver and they were going with the vegetable baskets. In view of these facts this admission of the claimant was not taken to be an admission of the nature which normally taken to be substantive piece of evidence. The matter would have been different where he himself was a party to the payment of fare or he has seen the deceased as paying the fare to the driver. So far as the plea of carrying the vegetable baskets with them by the deceased is concerned, the Tribunal has made reference to the relevant piece of evidence and rightly reached to the conclusion that this is not the correct state of affairs. One more important fact has been noticed by the Tribunal that the driver has no where stated in the statement or his claim application that he has charged fare from the persons who were travelling at the time of accident in the vehicle. All the claim applications have been decided together. The learned counsel for the appellant has failed to point out any such question put to the driver also. In this case some of the claimants who were

victims of the accident and sustained injuries have been examined and from their statement it comes out that the driver of the Matador who was known to these persons permitted them to travel in the matador free of charge. So on the basis of these pleadings and the evidence which has come on record I do not find that any perversity is there in the award of the Tribunal, where it held that the deceased persons were there in the vehicle with permission of the driver out of human feelings and without payment of fare. Their status at the most was of a gratuitous person. Otherwise also even if it is taken to be a case where the driver has taken fare from these persons, still in the absence of any pleadings and proof by the appellant that this act of the driver was authorised by the insured or it was within the knowledge of the insured is of no consequence. Any act which results in violation of the breach of the condition of the policy by the driver will not relieve or set free the insurance company from its liability where it is not with the consent or knowledge or authority of the insured. The insured has not violated the terms of the policy and if the driver on his own volition did all these things the insurance company cannot be set free. In this respect reference may have to the full bench decision of this court in the case of New India Assurance Company Ltd. vs Kamlaben reported in 1993(1) GLR 779, wherein the court has held that in order to successfully disclaim its liability on the ground as set out in Section 96(2)(b) of the Motor Vehicle Act,1939 the insurance Company has to establish; (i) that on the date of the contract of insurance, the insured vehicle was expressly or implicitly not covered by a permit to carry any passenger for hire or reward; (ii) that there was a specified condition in the policy which excluded the use of the insured vehicle for the carriage of any passenger for hire or reward; (iii) that the vehicle was, in fact, used in breach of such specified condition on the occasion giving rise to the claim by reason of the carriage of the passenger therein for hire or reward; and (iv) that the vehicle was used by the insured or at his instance in breach of specific conditions including a condition that in the goods vehicle passengers for hire or reward were not to be carried. If it is done without knowledge of the insured, why the driver's acts or omissions, the insurer would be liable to indemnify the insured. The burden of proof that the driver has carried the passengers on hire or reward with the knowledge of the insured or the insured had permitted the driver to carry the passenger for hire or reward cannot be exonerated from its liability by virtue of nonobstative clause contained in the said provision. The fact that the

insurance company has not proved that the insured has violated the terms of the policy or the driver at his instance, knowledge or authorisation has done it, irrespective of the fact of the admission made by the claimants, the insurance company has rightly been held to be liable to indemnify the insured for the amount of compensation awarded to the claimants in these two claim applications. Admission of the claimants is not that the driver has taken fare from the passengers with the knowledge or at the instance of the insurer. These matters are squrely covered by the aforesaid decision of this court.

6. In the result both these appeals fail and the same are dismissed with no order as to costs.

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